IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [illegible]

[illegible]

v.

[illegible]

On Appeal From the United States District Court for the Eastern District of Michigan

MOTION OF APPELLEE CARRIERS TO AFFIRM DECISION OF DISTRICT COURT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 721

COMMERCIAL BARGE LINES, INC., et al., *Appellants,*

v.

UNITED STATES OF AMERICA, et al., *Appellees.*

On Appeal From the United States District Court for the Eastern District of Michigan

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MOTION OF APPELLEE CARRIERS TO AFFIRM DECISION OF DISTRICT COURT

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, the barge-line appellees, Coyle Lines Incorporated, Dixie Carriers, Inc., John I. Hay Company, Mississippi Valley Barge Line Company, and Union Barge Line Corporation, and the railroad appellees, all of which were interven-

ing defendants in the District Court, move that the judgment of that Court be affirmed.

This is a direct appeal from the final judgment entered on October 28, 1958, by a specially constituted three-judge District Court convened pursuant to 28 U.S.C. 1336, 1398, 2284 and 2321-2325, dismissing appellants' complaint. The said complaint sought to set aside a declaratory order of the Interstate Commerce Commission (by Division 4) entered on March 20, 1957, in *Commercial Transport Corporation—Exemption Sections 303(b) and 303(f)(2)*, 300 I.C.C. 66, which declaratory order had been affirmed by order of the entire Commission on June 17, 1957, denying petition for reconsideration. Notice of Appeal was filed by appellants on December 22, 1958, and the Jurisdictional Statement was filed on February 19. 1959. The opinion of the District Court and the orders and opinion of the Commission are set forth in the Appendices to appellants' Statement as to Jurisdiction.

QUESTION PRESENTED

The question as presented by appellants on page 3 of their Statement as to Jurisdiction has been oversimplified to the point where it is ambiguous. A more precise statement of the question presented is the following:

> Whether the Commission, in its declaratory order of March 20, 1957, correctly ruled that the bulk commodity exemption in section 303(b) of the Interstate Commerce Act is inapplicable to a single tow of barges, which a water carrier is transporting, comprised of barges under its own bill of lading containing not more than three bulk commodities and other barges containing non-bulk

commodities being towed for a regulated carrier under the towage exemption in section 303(f)(2).

STATEMENT OF THE CASE

The three barge-line appellants in this proceeding are, in fact, a single enterprise, consisting of a parent corporation, American Commercial Barge Line Company, and two subsidiary corporations, Commercial Barge Lines, Inc., and Commercial Transport Corporation. The parent corporation and its subsidiary, Commercial Barge Lines, Inc., are certificated water carriers, whereas, the other subsidiary, Commercial Transport Corporation, is an unregulated carrier engaged in exempt transportation of bulk commodities under the exemption in section 303(b) of the Interstate Commerce Act (49 U.S.C. 903(b)). The appellants are one of the largest water carrier systems operating on the Missi. sippi River and its tributaries, and the unregulated appellant also operates on the Gulf-Intercoastal Waterway.

The appellees in this proceeding are the United States of America, the Interstate Commerce Commission, five certificated common carrier barge lines, and several railroads. The carrier appellees join in this motion. The Commission in its report and order, which is the subject of this appeal, referred to these carrier appellees in the following words (Jurisdictional Statement, page 40): "(They) are certificated barge and towboat carriers which operate along the Mississippi River and its tributaries, and the Gulf-Intercoastal Waterway, and the railroads which serve the territories tributary to these waterways."

The appellants throughout their Jurisdictional Statement make assertions giving rise to the inference

that the statutory interpretation sought by the appellants, and rejected by the Commission and the District Court, is desired by the water carrier industry generally and by the shipping public. The facts are to the contrary. Although the proceeding before the Commission was given wide publicity, including actual service of the Commission's notice instituting the proceeding, upon every certificated barge carrier operating on the aforementioned waterways, not a single water carrier, or shipper, or representative of the public or any other person joined Commercial Transport and its two affiliates in support of their contentions before the Commission or before the District Court. The appellants stand alone in urging their interpretation upon this Court, just as they were alone before the Commission and the District Court. Opposed to them are five regulated common carrier water carriers and the several railroads with whom they compete. As stated by the Commission in its Declaratory Order (Juris. Stat. p. 40), these water carriers and railroads are opposed to "an expansion of exempt operations, and a breakdown of regulated transportation on the inland waterways", which would result from a reversal of the Commission and the District Court.

This appeal is concerned with the exemption provisions appearing in sections 303(b) and 303(f)(2) of the Interstate Commerce Act, the pertinent portions of which read,

> Sec. 303(b):
>
> "Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used

for the carrying of not more than three such commodities. * * * For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel. * * *"

Sec. 303(f)(2):

"Notwithstanding any provision of this section or of section 302, the provisions of this part shall not apply—* * * (2) to transportation by water by any person (whether as agent or under a contractual arrangement) for * * * a water carrier subject to this part, * * * in the performance of * * * towage; but such transportation shall be considered to be performed by such carrier * * * as part of, and shall be regulated in the same manner as, the transportation by * * * water to which such services are incidental."

Two provisions of section 303(b) require particular attention. The phrase "not more than three such (bulk) commodities" has long been construed and applied by the Commisison as an absolute limitation, in that it excludes more than three bulk commodities and all non-bulk commodities. Thus, in effect, as construed by the Commission, this phrase reads "not more than three such (bulk) commodities *and no commodities not in bulk.*" No party to this proceeding, appellant or appellee, questions the correctness of this construction.

The other provision requiring particular attention is that relating to the meaning of the term "vessel". On the Mississippi River system, the general practice of the certificated water carriers is to transport commodities, which are loaded into barges, by lashing the barges together and propelling them by means of a separate towing vessel. The lashed barges and the towing vessel together comprise what is known as a

"single tow", and are navigated as a unit. Section 303(b) expressly provides that all the barges and the towing vessel in the single tow shall be considered a "single vessel" for the purposes of the exemption in that section.

Thus, if a single tow were comprised of a towboat and several barges loaded with three bulk commodities, grain, coal, and sulphur, and nothing else, the exemption in section 303(b) would apply to such operation, and it would be unregulated. But if an additional barge, loaded with steel pipe, were to be added to that single tow, the exemption would be inapplicable to the entire tow, including the barges with the three bulk commodities, and all the barges would be required to operate subject to regulation and at tariff rates.

No party to this appeal contests the validity of the foregoing interpretation of the application of the exemption in section 303(b). The appellants, however, are endeavoring to circumvent the plain meaning and application of that exemption by combining it with the exemption in section 303(f)(2). It is appellants' objective to have sections 303(b) and 303(f)(2) so construed that the non-certificated carrier, Commercial Transport, may combine in the same vessel or tow regulated non-bulk freight moving under the bills of lading of its certificated parent corporation and unregulated bulk freight moving under its own bills of lading, and have the bulk freight excluded from regulation.

The appellants admittedly propose to navigate as a single unit barges which contain both bulk and non-bulk commodities, but at the same time they hope to preserve the exempt status of the bulk commodities

under section 303(b), notwithstanding the plain wording of that exemption to the contrary. The appellants would achieve this result by the contention that, if the unregulated carrier, Commercial Transport, were to engage in the act of towing barges of regulated nonbulk commodities for its certificated parent, under the towage exemption in section 303(f)(2), in the same tow with Commercial Transport's own barges of bulk commodities, not only would the *act of towing* its parent's barges be exempt from regulation under section 303(f)(2), but the "umbrella" of that exemption would also extend to the *physical presence* of the nonbulk commodities in the same tow with the bulk commodities. Thus, if the Commission were to examine that tow to determine whether it would be exempt under the bulk commodity exemption of section 303 (b), it would have to ignore the physical presence of the non-bulk commodities.

In response to appellants' petition for a declaratory order, and after extensive briefing by the parties, the Commission (by Division 4) issued its report and order rejecting the construction proposed by appellants and stating (300 I.C.C. 66, 71):

> "We believe it is clear that nonbulk commodities cannot be included in a tow of bulk commodities without subjecting the entire cargo to regulation regardless of how the responsibility to shippers under bills of lading may be divided among two or more carriers. A study of the legislative history of section 303(b) leaves no doubt that Congress intended to exempt the transportation of commodities in bulk, but it is likewise clear that it intended to limit such exemption, and we have consistently so found."

Appellants then requested the full Commission to reconsider the report and order by Division 4, and on June 17, 1957, the full Commission affirmed the order of the Division by denying the petition for reconsideration. Thereafter, appellants filed a complaint in the United States District Court for the Eastern District of Michigan, requesting the Court to set aside the order of the Commission. The same water carriers and railroads, who opposed appellants before the Commission, intervened in the Court action as defendants. After full briefing and oral argument, the Court unanimously sustained the Commission and dismissed the complaint, stating (Juris. Stat. p. 32):

> "We find no ambiguity in the plain, easily readable language of 303(b). It seems obvious that by the enaction of 303(b), Congress intended to provide an exemption for a water carrier transporting commodities in bulk where no more than 3 bulk commodities are being transported—'no more than three such commodities' is the test, nothing more, nothing less. Either a prospective exemptee meets the test or it does not. It is that simple. If there is any doubt in the mind of one reading the first part of the section, such doubt becomes resolved when one reaches this sentence: ' . . . For the purposes of this subsection two or more vessels while navigated as a unit shall be considered a single vessel . . .' Section 303(b) is providing an exemption from regulation of a vessel (stated as including 2 or more vessels being navigated as a unit) where no more than 3 bulk commodities are being carried. This means that the unit must be considered in its entirety in order to appraise the impact of 303(b) on it. The test is laid down in 303(b), and that is all that is necessary. The makeup of the cargo is determinative as to 303(b). If the physical makeup of the 'ves-

sel' does not come within the 303(b) exemption, then how can plaintiffs seriously claim its benefit? As to 303(f)(2) an exemption is provided where simple towage is involved. The 303(f)(2) exemption has application to the particular situation outlined therein. No complicated theorizing is necessary to explain that which is apparent."

THE QUESTIONS RAISED BY APPELLANTS ARE WITHOUT SUBSTANCE

Rule 16 of the Rules of this Court provides for receiving "a motion to affirm the judgment" of a lower Court "on the grounds that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument".

Appellees believe there is utter lack of such substantiality in the questions raised by appellants in the present case, for the following reasons:

(a) The Wording of Section 303(b) Is Plain and Unambiguous and Clearly Leads to the Construction Given It by the Commission and the District Court

All the arguments which appellants advance here were presented at length to Division 4 of the Commission, then to the full Commission, and then to the specially constituted three-judge District Court. Both the Commission and the District Court held the wording of section 303(b) to be completely clear on its face. The exemption applies *only* when the cargo space of the vessel or tow is being used for the purpose of transporting three or fewer bulk commodities. If it is being used in any other way, the exemption is inapplicable. If there are four bulk commodities, the exemption is inapplicable to all of them. If there are three or less commodities and a non-bulk commod-

ity is added, the exemption is inapplicable to all of them.*

In *United States* v. *Missouri Pacific RR. Co.*, 278 U.S. 269, this Court was construing the short-haul language of section 15(4) of the Interstate Commerce Act and stated (p. 277):

> "The language of that provision is so clear and its meaning so plain that no difficulty attends its construction in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed, and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construction."

Appellees submit that the language of section 303(b) is as clear and the meaning as plain as that found in section 15(4), and nothing unreasonable results therefrom. There is no room in section 303(b) for squeezing in the exception contended for by appellants. The District Court in this proceeding aptly summarized the matter when it concluded its opinion with the statement: "No complicated theorizing is necessary to explain that which is apparent."

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* *American Barge Line Applications*, 260 I.C.C. 783, 785; *Conners Marine Co., Inc., Contract Carrier Application*, 250 I.C.C. 381, 385; *Mulqueen Contract Carrier Application*, 250 I.C.C. 436, 439; *Inland Nav. Co. Applications*, 250 I.C.C. 793, 707; *Jacob Rice & Sons Contract Carrier Application*, 250 I.C.C. 727, 729; *Central Barge Co. Applications*, 260 I.C.C. 329, 338; *Portland Tug and Barge Co., Ext.*, 265 I.C.C. 325, 335; and *American Barge Line Co. Pet. for Decl Order*, 294 I.C.C. 796, 799.

(b) The Legislative History Fully Supports the Commission's Construction of Section 303(b)

Appellants resort to legislative history in an attempt to justify their contention, but such recourse is both improper and fruitless. This Court, in the *Missouri Pacific Case,* supra, further observed (p. 278):

> "Where doubt exists and construction is permissible, reports of the committees of Congress and statements by those in charge of the measure and other like extraneous matter may be taken into consideration to aid in the ascertainment of the true legislative intent. But where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression and meaning intended. And in such cases legislative history may not be used to support a construction that adds or takes from the significance of the words employed."

This doctrine has full application here; but if legislative history were relevant, that history clearly confirms the Commission's construction. At the time Part III of the Interstate Commerce Act was being considered by the House, Mr. Pittenger proposed an amendment to section 303(b) which would have authorized the exempt carrier transporting three bulk commodities also to transport a non-bulk commodity (automobiles) on its deck without defeating the exemption. Chairman Lea of the House Interstate and Foreign Commerce Committee vigorously and successfully opposed the proposed amendment, stating (84th Cong., Record 9982):

> "There is no reason why a bulk carrier who is entirely exempt from regulation should be permitted to destroy the service of the common carrier."

This proposed amendment was defeated, not because the exempt carirer was already being given such authority by the combined use of sections 303(b) and 303(f)(2), as appellants contend, but because Congress did not want the exempt carrier to have such authority. Thus, appellants are arguing for a construction specifically contrary to the express intent of Congress.

(c) The Commission's Construction of Section 303(b) Does Not Frustrate the Meaningful Application of the Exemption in Section 303(f)(2)

The appellants in their Jurisdictional Statement have sought to create the impression that the Commission's construction of section 303(b) in its declaratory order has impaired, if not totally destroyed, the effectiveness of the towage exemption in section 303(f)(2). The Commission has done nothing of the kind. In the last paragraph of its order the Commission expressly stated (Jurisd. Stat., p. 42):

> ". . . and we further find that incidental towage performed for other carriers subject to the act is exempt from regulation under the provisions of section 303(f)(2) where a barge or barges of non-bulk commodities are towed in the same unit with bulk commodities, . . ."

In other words, under section 303(f)(2), the unregulated subsidiary, Commercial Transport, is free to tow the barges of its regulated parent, American Commercial, without Commercial Transport itself being subject to regulation. When it does so, however, section 303(f)(2) makes it clear that the operation of the tow, although being performed by Commercial Transport, will be subject to regulation *in its entirety*.

Thus, section 303(f)(2) is concerned solely with the matter of the *legal status*, for regulatory purposes, of the two carriers involved in a towage arrangement. Section 303(f)(2) has two provisions: one providing for regulation, and the other for exemption. When a carrier issues its bill of lading to a shipper for a barge-load of freight, and then employs another carrier to tow the barge, the first provision of section 303(f)(2) provides that the bill-of-lading carrier will be subject to regulation with respect to that barge to the same extent as if it were providing the power itself; and the second provision exempts the *tower* from regulation as to such towage, so that two carriers will not both be subject to regulation for the same service. Section 303(f)(2) does no more than this.

Despite appellants' sweeping generalizations that the intended benefits of section 303(f)(2) will be destroyed by the Commission's interpretation, that section is being, and long has been, used extensively and beneficially by all forms of water carriers, entirely apart from the type of use to which appellants would put it. Certificated common carriers employ the section 303(f)(2) exemption very frequently under reciprocal towing agreements, pursuant to which they tow the barges of one another when excess capacity is available. In addition, the certificated common carriers very frequently hire independent tow boats operating under that exemption to tow their barges when the common carrier does not have sufficient tow boats of its own.

Appellants argue that the section 303(f)(2) exemption is practically worthless unless the unregulated carriers hauling exempt bulk commodities may add barges of non-bulk commodities to those tows without

destroying the section 303(b) exemption for the bulk commodity barges. Appellants completely ignore the present extensive use of that exemption by the regulated common carriers as between themselves and by independent towers in towing for the common carriers.

In this connection, appellants argue in substance that the effect of the Commission's interpretation is to accomplish what is already provided for under the leasing or charter provisions of section 302(e), and that section 303(f)(2) is superfluous under the Commission's interpretation, but this contention is wholly fallacious. The towing exemption in section 303(f)(2) if far broader than the leasing provision and permits a regulated common carrier to tow barges for another common carrier along with its own regulated barges in the same tow. This could not be done by the leasing of a tow boat. Moreover, the unregulated tow boat operators may simultaneously tow the barges of two or more common carriers in a single tow under the exemption in section 303(f)(2). This they could not do under the leasing provisions of section 302(e).

The present application of the exemption in section 303(f)(2) to regulate common carrier water transportation is both extensive and useful, despite the contrary self-serving assertions of the appellants.

(d) The Interpretation by the Commission and the District Court Conforms Completely to Other Commission and Court Decisions Interpreting the Precisely Parallel Motor Carrier Provision in Part II of the Act

The water carrier bulk commodity exemption in section 303(b) finds its precise counterpart in the motor carrier agricultural commodity exemption in section 203(b)(6) of the Act. The two exemptions are analogous both as to form and substance. Both

exempt the transportation of specific types of commodities and both impose a restriction confining the use of the conveyances to the exclusive transportation of such commodities. Thus, in section 203(b)(6) motor vehicles carrying agricultural commodities are exempt from regulation *only* "if such motor vehicles are not used in carrying any other property." Likewise, in section 303(b), water carriers transporting bulk commodities are exempt from regulation *only* "when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities".

In *Interstate Commerce Commission* v. *Dunn*, 166 F. 2d 116 (CCA-5, 1948), an argument almost identical to that of appellants here was made. In that case the motor carrier contended that it could carry *intrastate non-agricultural* commodities on the same truck at the same time with interstate agricultural commodities without destroying the exemption in section 203(b)(6). It contended that the intrastate traffic was not subject to regulation by the Commission, and therefore could not be considered by the Commission in determining whether the truck was carrying "*only* agricultural commodities". The Court rejected this contention and applied the clear and plain meaning of section 203(b)(6), holding that the exemption applied only if *nothing* except agricultural commodities were being transported. Even though the non-agricultural commodities being transported were not subject to Commission regulation, nevertheless they defeated the exemption by being mixed with the agricultural commodities.

The Court simply looked to the *physical makeup of the cargo on the truck* in determining whether the

exemption was applicable. This is precisely what the Commission does with the section 303(b) exemption. It looks to the *physical makeup of the cargo in the barges.* If it is other than one to three bulk commodities, the exemption is inapplicable. The commission is not concerned with the bills of lading applicable to the cargo, or whether some of those bills of lading may have been issued by the tower while others were issued by a common carrier whose barges are being towed. The *Dunn Case,* supra, has been followed by the Third Circuit in a similar case, *Interstate Commerce Commission* v. *Service Trucking Co. Inc.,* 186 F. 2d 400 (CA-3, 1950). and by the Commission, *Peters Common Carrier Application,* 73 M.C.C. 331.

(c) The Interpretive Letter Upon Which Appellants Rely Is of No Significance

At page 5 of the Jurisdictional Statement, appellants refer to an interpretive letter written in 1944 by the Assistant Director of the Commission's Bureau of Water Carriers indicating that Division 4 then shared appellants' view as to the interpretation of sections 303(b) and 303(f)(2). Appellants exaggerate the significance of this letter to the point where they speak of it as an "opinion of the Commission". It was nothing of the kind. The letter was written informally. There was no adversary proceeding or notice to other water carriers. The letter was not issued by the Commission but was an informal communication from a Bureau official; and significantly, it was issued during a time of war, when transportation facilities were in extreme shortage, and when every conceivable measure was being employed to move the maximum amount of traffic.

(f) The Commission's Construction Preserves, Rather Than Impairs, the Efficiency and Economy of the Regulated Transportation System

When Congress in 1940 brought water carriers under the regulatory provisions of the Interstate Commerce Act, it recognized in the National Transportation Policy enacted at the same time (49 U.S.C., prec. sec. 1) that all segments of the *regulated* transportation industry must remain economically strong and that unfair or destructive competitive practices must be avoided. Consistent with this objective, Congress carefully defined and limited the exemptions provided in the Act, for the purpose of protecting the regulated carriers "upon their restricted routes and limited carriage" as against unjust competitive operations which might be conducted as exempt services at economic advantage. *American Trucking Assns.* v. *United States*, 344 U.S. 298, 318 (1953).

The appellants would not be standing alone today, and the carrier appellees would not have strenuously opposed appellants' contention at every stage of this proceeding, if the economy and efficiency of the regulated transportation system would be improved by appellants' suggested interpretation of the provisions of section 303(b) and 303(f)(2). *Regulated transportation is not, and never has been, improved by the extension of exemptions from regulation.* Actually, appellants desire only to improve their own unique competitive position on the rivers by combining the extensive resources and operations of the unregulated subsidiary with the far-flung operations of the regulated common carrier parent, in a way which will permit the combined operations to invade the regulated transportation field while operating under un-

regulated rates. Such a result would flow from the interpretation proposed by the appellants and could only lead to demoralization and adversity in the regulated industry.

In view of the foregoing, the carrier appellees respectfully submit that appellants present no substantial question requiring the attention of this Court and that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

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March 20, 1959

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion to Affirm of Appellee Carriers were served by first class mail or airmail this 20th day of March, 1959, upon the following counsel of record at the addresses shown:

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